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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD L. MITCHELL, JR.,
*Petitioner,*
*vs.*
THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN S. KINSLER, General Counsel*

LOS ANGELES COMMUNITY COLLEGE DISTRICT

617 West Seventh Street
Los Angeles, California 90017
(213) 891-2188

*Attorney for Respondents*

*Counsel of Record

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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*Attorney for Respondents*

*Counsel of Record

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## STATEMENT OF THE CASE

### A. Nature of the Case

Petitioner, Dr. Richard L. Mitchell, contends that he was the victim of race and age discrimination resulting from Respondents' failure to appoint him to several administrative positions in the Los Angeles Community College District. Dr. Mitchell also claims that he was denied due process by the Respondents in their handling of his internal discrimination complaint. Petitioner alleges that the District and its employees violated federal and state law by discriminating against him on the basis of race and age and by denying him due process of law.

Dr. Mitchell's inability to obtain a job with the Los Angeles Community College District results from his lack of competitive qualifications

and his failure to renew his job application when instructed to do so.

This lawsuit constitutes at least the third attempt by the Petitioner to label educational institutions in Los Angeles County as racist. As with his prior claims pursued in the trial court and the Ninth Circuit Court of Appeals, this one is made of whole cloth. Dr. Mitchell's claims are the result of a paranoid obsession with racism and a grandiose perception of his own qualifications. For example, see Richard L. Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844 (9th Cir., 1986).

B. Statement of Facts

In conjunction with the issuance of its judgment in this action, the trial court developed an excellent synthesis of the case, and the trial court's Findings

of Fact are set forth in Appendix B accompanying the Petition. (Hereinafter "App. B.") The court of appeals accurately summarized the facts in its opinion. Mitchell v. Los Angeles Community College District, 861 F.2d 198, 199-200 (9th Cir. 1988). Simply stated, the facts are these:

1. Dr. Mitchell claims discrimination in the District's failure to invite him for more job interviews. This cannot be so because the paper-screening which occurs prior to interviews is "color-blind."

2. Dr. Mitchell claims he would have been appointed to the position of Senior Director, Occupational and Technical Education, but for the District's blatant race and age discrimination. Dr. Mitchell proved himself unqualified at his interview.

The job description requires familiarity with the Job Training Partnership Act (JTPA). Plaintiff did not even know that JTPA had replaced the Comprehensive Employment and Training Act. (App. B, p.13.)

3. Dr. Mitchell claimed the District retaliated against him for having filed claims of discrimination when he was rejected for the position of Assistant Dean, Academic Affairs at Los Angeles Southwest College on June 11, 1984. The undisputed fact of the matter is that the decision-maker, Dr. McIntosh, did not know and had no reason to know about Petitioner's earlier claims of discrimination. (App. B, pp. 15-16.) There simply was no causal nexus between the protected activity and the adverse decision.

4. Dr. Mitchell claims that he was retaliated against for his earlier claims when he was denied the position of Assistant Dean, Occupational Education. Petitioner simply failed to comply with the District's reasonable requirement that an up-to-date application be kept on file in the Personal Operations Branch of the District. There was no adverse decision; Plaintiff's name was not in the assistant dean pool because of his failure to timely renew his application. (App. B, p. 16.)

5. Petitioner claims that he was denied due process after the District failed to timely respond to his internal discrimination complaint. Petitioner chooses to ignore the fact that at the same time his internal complaint was pending, the very same allegations were being investigated by the U.S. Department

of Education's Office for Civil Rights and that the District's Office of Affirmative Action Programs and Services was deeply involved in resolving that complaint. (App. B, pp. 17-20.) Petitioner may not impose an unnecessary duplication of effort on the District. California law recognizes that. 22 California Administrative Code section 98410.

Dr. Mitchell knew prior to filing this action that his claims were meritless, yet he pursued them anyway. This sort of conduct should be made the subject of sanctions, particularly where the plaintiff knows from past experience that his conduct results in a huge waste of time and effort by the courts and his intended victims.

## ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT, ITS BOARD OF TRUSTEES AND ITS EMPLOYEES SHARE IN THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND ARE THUS NOT SUBJECT TO LIABILITY PURSUANT TO 28 U.S.C. SECTIONS 2201-2202 OR 42 U.S.C. SECTIONS 1981, 1983, 1985 OR 2000(d).

Dr. Mitchell bases this action in large part on 28 U.S.C. sections 2201-2202, 42 U.S.C. sections 1981, 1983, 1985 and "Code of Federal Regulations section 100.7(e)" (sic). (Appellees assumed Dr. Mitchell was referring to 34 C.F.R. Part 100.7(e).) These regulations were promulgated in order to implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000(d).)

The Eleventh Amendment of the United States Constitution bars any finding of liability on the part of the District, its Board of Trustees or its employees, acting in their official capacity. California's community college districts are agencies of the state for the local administration of public higher education and have been recognized as such by California law since at least 1956. As a result, California community college districts share in the state's immunity under the Eleventh Amendment. See, for example, Stones v. Los Angeles Community College District, 572 F.Supp. 1072 (C.D. Cal., 1983), affirmed on

other grounds, 796 F.2d 270 (9th Cir., 1986).[1]

A. California Community Colleges Share In the State's Immunity From Federal Liability.

Under the Eleventh Amendment of the United States Constitution, California's community college districts are not subject to suit in federal court by private parties where, as here, there has been no waiver by the state of its sovereign immunity and no abrogation of that immunity by Congress. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241-243, 105 S.Ct. 3142, 3147-3149 (1985). This principle is firmly woven

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[1] Contrary to Petitioner's assertion, the Ninth Circuit in Roberts v. College of the Desert, 861 F.2d 1163 (9th Cir., 1988), decided, prior to publication of this case, that Roberts should be remanded to the trial court for further factual findings on the issue of Eleventh Amendment immunity. Roberts, supra, 861 F.2d at 1170-1171.

into the fabric of American jurisprudence. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504 (1890); Great Northern Life Insurance Co. v. Reed, 322 U.S. 47, 64 S.Ct. 873 (1944).

In Quern v. Jordan, 440 U.S. 332, 343-345, 99 S.Ct. 1139, 1146-1147, (1979), the Supreme Court held that states and their agencies are not persons amenable to suit under 42 U.S.C. section 1983 because of the immunity conferred upon them by the Eleventh Amendment. The state's immunity under the Eleventh Amendment from suits in federal court based on 42 U.S.C. section 1983 is well established. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). Liability pursuant to 42 U.S.C. section 1985 requires an underlying violation of section 1983, and where, as here, the defendants are not liable

under section 1983, they are likewise not liable under section 1985. Damage suits against state agencies premised upon 42 U.S.C. section 1981 are likewise barred by the Eleventh Amendment. Peters v. Lieualien, 693 F.2d 966, 970 (9th Cir., 1982). Liability pursuant to 42 U.S.C. section 2000(d) is likewise precluded by the Eleventh Amendment. Cf. Atascadero State Hospital v. Scanlon, supra, 473 U.S. as 241-243, 105 S.Ct. at 3147-3149 (1985). Similarly, 28 U.S.C. sections 2201-2202 do not authorize suits against states and therefore cannot be used to circumvent the Eleventh Amendment. Green v. Mansour, 474 U.S. 64, 73, 106 S.Ct. 423, 428 (1985); Foreman v. G.M., 473 F.Supp. 166 (E.D. Mich., 1979). Under California law, agencies of the state are not persons for purposes of 42

U.S.C. section 1983. Pyne v. Meese, 172 Cal.App.3d 392, 403 (1985). Even a state court would have to dismiss these claims as a matter of law.[2]

The issue, of course, is what constitutes a state agency? The Supreme Court grappled with the problem in its decision in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

> "The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the state partaking of the state's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law." 429 U.S. at 280, 97 S.Ct. at 572.

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[2] Plaintiff's reliance on First Interstate Bank v. State of California, 197 Cal.App.3d 627, 243 Cal. Rptr. 8 (1987) is misplaced. For purposes of Eleventh Amendment analysis, First Interstate is not inconsistent with the District's position in this litigation.

The Court reviewed Ohio law, and concluded that the Mt. Healthy City School District was more like a city or county than like an agency of the state. But the salient feature of the Court's analysis is the principle that to determine whether an entity participates in a state's Eleventh Amendment immunity, a federal court must look to state law. This is consistent with principles of federal jurisdiction. See, e.g., Board of Regents v. Tomanio, 446 U.S. 478, 483-84, 100 S.Ct. 1790, 1795 (1980) (noting that 42 U.S.C. section 1988 instructs federal courts to refer to state law to determine the extent of federal jurisdiction under section 1983 as a matter of federal law). Hence, as a matter of federal law under the Eleventh Amendment, Ohio law may require a finding that the Mt.

Healthy City School District is not an arm of the state, but California law may require a finding that school and community college districts are part of a state system of public education.

A number of circuits have been called upon to perform this application of state law, and the results have varied depending upon the provisions of the laws they were called upon to apply.

For example, the Tenth Circuit Court of Appeals concluded that New Mexico law compelled the conclusion that a local school board and its members were immune, under the Eleventh Amendment, from a suit over alleged infringement of First Amendment rights, because local boards were arms of a state system of education. Martinez v. Board of Education of Taos Municipal School District, 748 F.2d 1393 (10th

Cir., 1984). See also Maestas v. Board of Education, 749 F.2d 591 (10th Cir., 1984). In Delta Special School District No. 5 v. State Board of Education for the State of Arkansas, 745 F.2d 533 (8th Cir., 1984), the Eighth Circuit reaffirmed that school districts in Arkansas are political subdivisions of the state, emphasizing that the benefit of that status carries with it burdens as well. The Sixth Circuit concluded that the Medical College of Ohio is not an agency of the State of Ohio, Hall v. Medical College of Ohio, 742 F.2d 299 (8th Cir., 1984), although its analysis, derived from Mt. Healthy City School District v. Doyle, supra, compelled the conclusion that Michigan State University is an arm of the State of Michigan. Hutchins v. Board of Trustees of Michigan State University, 595

F.Supp. 862 (W.D. Mich., 1984). When the Fifth Circuit examined community college districts in Texas and concluded that they were not agencies of the state, Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir., 1975); Goss v. San Jacinto Junior College, 558 F.2d 96 (5th Cir., 1979), it recognized that its conclusion was a function of "peculiar Texas statutory and decisional law." Jagnandan v. Giles, 538 F.2d 1166, 1174 (5th Cir., 1976).

The Ninth Circuit has been called upon to apply these principles on a number of different occasions, and has examined the laws of Arizona (Rutledge v. Arizona Board of Regents, 660 F.2d 1345 [9th Cir., 1981] Montana (State of Montana v. Peretti, 661 F.2d 756 [9th Cir., 1981]), Hawaii (Hoohuli v. Ariyoshi, 741 F.2d 1169 [9th Cir.,

1984)) and California (Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir., 1982)) to conclude that institutions of public higher education are arms of the state and share in Eleventh Amendment immunity. The principles developed in those cases serve as a firm foundation for an examination of California law relating to community college districts, and compel the conclusion that a California community college district shares the state's immunity under the Eleventh Amendment.

B. As a Matter of California Law, Community College Districts Are State Agencies.

California courts have long held that as a matter of state law, California's school and community college districts are agencies of the state for the local operation of the

state school system. They are distinctly not municipalities. They are not independent local school districts as was the Mt. Healthy City School District. They are subject to the plenary authority of the state legislature, and not to any local regulatory effort.

The watershed statement of the nature of California's school and community college districts was Hall v. City of Taft, 47 Cal.2d 177 (1956). In Hall, the California Supreme Court synthesized a number of its previous statements about California's public institutions of education with the constitutional status of education in California.

The facts of Hall were simple. The Taft Union High School and Junior College District (i.e., community

college district) wished to construct a school building. Its plans and specifications had been approved, as required (and still required) by the State Department of Education and the State Division of Architecture. However, the City of Taft attempted to impose its building and zoning requirements on the construction. The California Supreme Court held that it could not do so.

> "The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state legislature is given comprehensive powers in relation thereto." Hall v. City of Taft, 47 Cal.2d at 179.

The Court was persuaded that the provisions of the California Constitution absolutely precluded any other conclusion. The Constitution provided, at Article IV, Section 25,

subd. 27, that the legislature could not pass local or special laws providing for the management of common schools; it still provides, at Article IV, Section 16, that a local or special statute is invalid in any case if a general statute can be made applicable. In nearly every instance of school or community college regulation, a general statute is applicable.

Article IX, Section 1, still provides that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Article IX, Section 5 still provides that the legislature shall provide for a system

of common schools. Article IX, Section 6, provides in extensive detail for the staffing, salary, organization, finance, and appropriations of the state's school system. No school or college may be transferred from the public school system or placed under the jurisdiction of any authority other than one included within the public school system. Article IX, Section 14, declares again that the legislature shall have the power, by general law, to provide for the incorporation and organization of school and community college districts.

The detailed requirements of Article IX contrast sharply with the brief, general provisions of Article XI of the California Constitution relating to local government. Significantly, Article XI, Section 1, specifies that counties are "legal subdivisions" of the

state; no parallel provision appears in Article IX relating to school or community college districts. The California Constitution consigns true municipalities to their electorates but assures that school and community college districts will be subject to close legislative scrutiny.

It is true that school and community college districts are locally organized. They are so organized pursuant to state law. As noted in Hall v. City Taft, supra.

> School districts are agencies of the state for the local operation of the state school system. (Citations omitted). The beneficial ownership of property of the public schools is in the state (citations omitted) ... [t]he beneficial owner of the fee [of public school property] is the state itself, and ... its agencies and mandatories - the various public and municipal corporations in whom the title rests - are essentially nothing but trustees of the state, holding the

> property and devoting it to the uses which the state itself directs." Hall v. City of Taft, 47 Cal.2d at 181-182. (Emphasis added.)

Since the supreme court's decision in Hall v. City of Taft, its holdings that school and community college districts are state agencies, and that the legislature has plenary authority over education in California, have been recurring themes in the decisions of California courts. The decision has controlled many issues, and has never been seriously questioned.

The California Supreme Court has shown no sign of doubting its own analysis. In Lerner v. Los Angeles City Board of Education, 59 Cal.2d 382, 29 Cal.Rptr. 657 (1963), the court noted that the board of education served as an agency of the state. In San Francisco Unified School District v. Johnson, 3

Cal.3d 937, 951-952, 92 Cal.Rptr. 309 (1971), the Court stated that:

> "Education, including the assignment of pupils to schools, is plainly a state function (citation omitted). 'The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution' (citation omitted). To carry out this responsibility the state has created local school agents of the state."

The foregoing analysis compels the conclusion that California's community college districts are agencies of the state for the local administration of public higher education, and thus share in the state's immunity from suits in federal court under the Eleventh Amendment. However, there is ample factual basis for this conclusion as well.

C. As A Matter Of Fact, California Community College Districts Are State Agencies.

From the analysis above, it is clear that federal courts look to a number of factors to conclude that a public entity is entitled to claim the shield of the Eleventh Amendment. Martinez v. Board of Educationof Taos Municipal School District, 748 F.2d 1393 (9th Cir., 1984), Vaughn v. Regents of the University of California, 504 F.Supp. 1349 [(E.D. Calif., (1981)]. Perhaps the single most compelling factor is the determination that any judgment obtained will be satisfied by state or state-controlled funds. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979). Courts have also looked to the extent to which the state retains a measure of control over the governing

body of the public entity, and the importance of the function involved. Vaughn v. Regents of the University of California supra, at 1351-1354 (1981).

An examination of the role of California's community colleges in the scheme of higher education in California, all by reference to information of which the federal courts may take proper judicial notice pursuant to Federal Rules of Evidence, Rule 201, demonstrates that the colleges are state agencies. The court of appeals so found, and this Court should hesitate long before disturbing these factual findings. (App. B, pp. 24-26.)

First, the state has retained significant control over the governing bodies of California community college districts, and the functions they perform. As noted, all district

property is considered to be held in trust for the benefit of the state. Hall v. City of Taft, supra. The members of the governing boards are aptly denominated "trustees," California Education Code section 72230. No governing board comes into existence without state approval, see Education Code sections 74200 et seq..

Second, community college districts, like the University of California, are engaged in the performance of "the essential governmental function" of providing higher education to the citizens of the State of California. The state has a particular interest in the education of its population and has made it an essential function of state government. The California Constitution, Article IX, provides for a system of public

education, including community college districts. Higher education is a function in which the state has taken a tender interest.

Third, and most important, any judgment awarded in this case against the district would be satisfied ultimately out of state funds. The California Constitution recognizes that California's school and community college districts are dependent ultimately on the state treasury for their funds. Support of the public schools and public institutions of higher education is made the first charge on the state's revenues, Article XVI, Section 8 of the California Constitution. In November of 1988 voters in the State of California adopted "Proposition 98" which amended Articles XIIIB and XVI of the California

Constitution to assure specific levels of state funding for schools and community college districts and to transfer to such districts state revenues in excess of the state's appropriation limit.

The function of the state lottery, also enacted by the voters by initiative measure at Government Code sections 8880 et seq. is the support of education, see Government Code section 8880.1.

The state's control over revenues has always been an integral element of community college finance. Although local property taxes were used to supply the funds to support community colleges, the state retained authority over the amount of tax to be collected. The enactment of Article XIIIA into the Constitution through approval by the

voters of Proposition 13 in 1978 reinforced this high degree of state involvement in the funding of California community colleges. Pursuant to Article XIIIA, property taxes are limited to 1% of full cash value, and only the legislature has the authority to increase taxes. The local taxing authority was virtually eliminated.

Since the enactment of Article XIIIA, the state legislature has adopted a series of finance measures designed to fulfill its obligation under Article XVI, Section 8. The first was the Community College Emergency Finance Act of 1978 (Education Code sections 84900 et seq.), which simply supplanted the substantial loss of local revenues in fiscal year 1978-79 with funds from the state general fund. The Emergency Finance Act has been amended each budget

year to refine and clarify the mechanisms whereby the legislature appropriates funds to community college districts.

The funding formulas created by the state budget in 1981, and by Chapters 103 and 1178, Statutes of 1981, require that all locally raised revenue be appropriated by the state into the total budget available for allocation to any community college district. The state determines what each community college district should be allocated based on formulas which derive from average daily attendance in each district. (Education Code sections 84500 et seq.) Each college district is entitled to receive its allocation of local and state revenue in accordance with the formula. The formulas are calculated to effect a legislative

policy of equalization of funding on a statewide basis.

Pursuant to Chapter 1, Statutes of 1984, all community college districts are now required to levy an enrollment fee on their students. This enrollment fee is appropriated by the state into the allocation formula described above, and does not accrue to the benefit of the local district, but to the benefit of the state. The state determines the amount of the fee, and there is no local discretion over it.

Clearly, if the Respondent District were required to pay a judgment to Petitioner, it would do so with funds which it has pursuant to the state's authorization. Any judgment in this matter would be satisfied with state controlled funds, and would impact state revenues.

The trial court and court of appeals correctly found that as a matter of fact California community college districts are agencies of the state, and that Petitioner presented absolutely no evidence to rebut those facts.

D. Plaintiff Is Not Entitled To Injunctive Relief.

In this case the court of appeals also concluded that if claims for monetary relief are barred, then as to the state and its agencies, i.e., the District, injunctive relief is unavailable as well. Pugh v. Alabama, 438 U.S. 781, 98 S.Ct. 3057 (1978). See also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100-101, 104 S.Ct. 900, 908 (1984). (Jurisdictional bar applies regardless of the nature of the relief sought.)

This action seeks to compel Respondent to employ Petitioner as a permanent certificated administrator. This is precisely the intrusion on state sovereignty which the Eleventh Amendment was designed to avoid. Pennhurst State School and Hospital v. Halderman, supra, 465 U.S. at 106, 104 S.Ct. at 911 (1984). Injunctive relief compelling Petitioner's employment conflicts directly with the principles of federalism that underlie the Eleventh Amendment. This Court must reject Petitioner's invitation to engage in "government by injunction." Schlessinger v. Reservist Committee to Stop the War, 418 U.S. 208, 222, 94 S.Ct. 2925, 2933 (1974).

E. The Individual Respondents Are Immune As Well.

Although the caption of the Second Amended Complaint in this action appears to name Dr. Koltai, Dr. Mulrooney, Dr. Washington, Dr. McIntosh, Mr. Spaeter, Ms. Palmer and Mr. Patterson in their individual, as well as official capacities, the Complaint implicitly makes the judicial admission that all of the acts alleged were made by the Defendants within the scope of their employment. The trial court found that no acts were alleged either in the Second Amended Complaint or in Dr. Mitchell's Declaration, other than those occurring as a result of the Defendants acting in their official capacity. (App. B, p. 26.)

It is well settled that if the claims for monetary relief against the

state agency are barred by the Eleventh Amendment, then those same claims against the individual representatives of the agency, acting in their official capacity, are likewise barred. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55, 98 S.Ct. 2018, 2035, n.55 (1978). This is because actions against the officer are in essence actions against the governmental entity of which the officer is but an agent. Any monetary award would be paid with state money. To the extent the Court believes that the Defendants have committed any acts in their individual capacity, they are entitled to qualified good faith immunity from liability.

CONCLUSION

Dr. Mitchell's claims are barred as a matter of law by the Eleventh

Amendment. The Ninth Circuit Court of Appeals properly interpreted California law. Certiorari must be denied or, alternatively, the Ninth Circuit's opinion should be summarily affirmed.

Dr. Mitchell's conduct in this Court and in the courts below must be made the subject of sanctions in the form of an award of attorney's fees to the Respondents.

Dated: 4/28/89 Respectfully submitted,

WARREN S. KINSLER
General Counsel
Attorney for Respondent
LOS ANGELES COMMUNITY
COLLEGE DISTRICT